CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1818.

East'n District. *July*, 1818.

LUCILE vs. TOUSTIN.

LUCILE vs. *TOUSTIN*.

Although a sale in writing, was made in a place where it might have been made verbal, parol evidence of it may not be received, without proof of the loss of the writing.

APPEAL from the court of the parish and city of New-Orleans.

DERBIGNY, J. delivered the opinion of the court. The appellant and defendant has been, by herself and her vendor, in possession of a female slave during more than five years. That slave is now claimed by the plaintiff and appellee, as having never ceased to be hers. It is proved that previous to the month of May, 1809, the appellee was the owner of this slave; but the appellant alledges that the appellee then sold her to the person under whom she holds. She relies on that sale, and further pleads prescription.

East'n District. *July*, 1818.

LUCILE vs. TOUSTIN.

The appellant abundantly proves by a number of witnesses that this slave was sold by the appellee to Mlle. Maurin, the appellant's vendor, sometime in 1809. But, as some of those witnesses also deposed that a written act of that sale was executed, a question has arisen whether the defendant could produce any parol evidence of the sale, without first proving the loss of the document in the manner prescribed by law.

That such is the rule, when the contract is one of those for which the law requires a written act, is, of course, not disputed. The question is, whether this rule is to govern in case where a contract, which could have been made verbally, was reduced to writing: for it is admitted that verbal sales of slaves are not illegal in the country where this is said to have taken place.

Although this is not a case where the written proof of the contract could alone be received, and where, in its defect, no parol evidence would be admitted without first shewing that it was lost through some unavoidable accident; yet, the moment it appeared that the purchase here relied on had been reduced to writing, it became the duty of the defendant to produce the instrument, or shew that it was not within her

power or reach, according to this first rule of evidence, that "the best evidence should be produced which, from the nature of the case, must be supposed to exist." The defendant having neglected to produce it, lies under the suspicion of concealing a document which, if exhibited, would make against him; and all his parol testimony must go for nothing.

The manner in which a part of the statement of facts, agreed upon between the parties, is conceived, had caused the court to doubt whether they ought not to consider the bill of sale spoken of by the witnesses as actually produced, though the judgment of the inferior court is bottomed on the omission of the defendant to produce it; because the statement of facts contains a copy of that sale, under the name of "document admitted by the plaintiff." But, in refering to the other part of the statement, it is seen, that this admission must have been made since the judgment appealed from was rendered; for the parties further agree, that the plaintiff shall have a right to make all legal objections against the parol evidence, as inadmissible, before the loss of the bill of sale had been proven.

No title having been shewn by the defendant,

East'n District. July, 1818.

LUCILE vs. TOUSTIN.

his possession of the slave, during five years, cannot avail him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Davezac for the plaintiff, *Morel* for the defendant.

HART vs. *CLARK'S EX'S.*

A verbal promise, to pay to the vendor, the difference between the price at which a tract of land is purchased, & that at which it may be sold, cannot support an action.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This action is brought on a verbal promise, said to have been made by the defendants' testator, according to which he was to pay over to the plaintiff all the surplus of the sum of six thousand five hundred and eighty-nine dollars, the price for which the plaintiff had re-sold to him the tract of land, described in the petition, which, it is averred, he sold for eight thousand dollars, with specified interest thereon. The difference between the latter sum, with said interest, and the former, is claimed.

It is the opinion of this court, that the promise or agreement thus made, must be consider-

East'n District. July, 1818.

HART vs. CLARK'S ex'rs.

ed either as a donation on his part, or as an addition to the price at which he re-purchased the land, by a deed, bearing date of the 11th of March, 1811.

As a donation, being verbal, the agreement created no perfect obligation on the part of the testator to fulfil his promise, and his executors cannot be legally compelled to comply with it.

If the agreement be considered as a stipulation to pay an additional price for the land, the plaintiff and appellant is equally without a remedy: it makes no part of the written contract between parties, and parol evidence cannot be received in its support. This point was settled in *Clark's ex'rs & al.* vs. *Farrar*, 3 *Martin*, 252, 253.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Maybin for the plaintiff, *Turner* for the defendants.

JOURDAN vs. *PATTON*.

If, on an injury done to her slave, the plain-

APPEAL from the court of the parish and city of New-Orleans.

East'n District. July, 1819.

JOURDAN vs. PATTON.

MATHEWS, J. delivered the opinion of the court. The plaintiff claims damages, for an injury done to one of her slaves, by one of the defendant's. She obtained judgment, and the defendant appealed.

The injury done to the slave was of such a nature as to render him wholly useless, his only eye having been put out.

The parish court decreed that the plaintiff should recover twelve hundred dollars, the supposed value of the slave, and a further sum of twenty-five dollars a month, from the time he was deprived of his sight; and that the defendant should pay the physician's bill, and one hundred dollars, for the sustenance of the slave during his life, and that he should remain for ever in the possession of the plaintiff.

We are of opinion, that this judgment is erroneous, in giving damages for the full value of the slave, and compensation for the loss of his labor, from the time he became blind, during an undetermined period. Further, it is thought to be erroneous, in decreeing that the defendant should pay two hundred dollars for the subsistence of the slave, and that he should remain for ever in the possession of the plaintiff.

The most that could have been equitably claimed, in addition to the full value of the

tiff recover his full price, the property is transferred to the defendant, on payment of the judgment.

No interest can be given on such a price, but the damage sustained by the plaintiff by the delay in receiving it, till a fair judgment may be taken into view in valuing the slave.

slave, was legal interest thereon; which, though it could not be given as interest, upon an uncertain and unliquidated sum, might have been taken into view, in estimating and fixing the damages.

In the present case, from a comparison of the testimony, as to the value of the slave, we are of opinion that full and complete indemnity has been given, for a total loss. When the defendant shall have paid the sum thus decreed, we are of opinion that the slave ought to be placed in his possession, deeming that the judgment making full compensation to the owner operates a change of property. In this view of the case, that part of the judgment of the parish court, which orders the defendant to pay two hundred dollars, is evidently erroneous. The principle of humanity, which would lead us to suppose that the mistress, whom he had long served, would treat her miserable, blind slave with more kindness than the defendant, to whom the judgment ought to transfer him, cannot be taken into consideration, in deciding this case. Cruelty and inhumanity ought not to be presumed against any person. A remedy for them can only be applied, when they are legally proven.

The judgment of the parish court being er-

East'n District. July, 1818.

JOURDAN vs. PATTON.

roneous, in these points, it is ordered, adjudged and decreed, that it be annulled, avoided and reversed; and this court, proceeding to give such a judgment as, in their opinion, ought to have been given in the court below, it is further ordered, adjudged and decreed, that the plaintiff recover from the defendant the sum of twelve hundred dollars, as an indemnification for the value of the slave, and that she shall further recover the amount of all expences incurred for the attendance and treatment of the slave, with costs of suit in the inferior court.

Maybin for the plaintiff, *De Armas* for the defendant.

WILLIAMSON & AL. vs. *THEIR CREDITORS.*

APPEAL from the court of the first district.

Before the act of 1817, syndics of an insolvent could, for the purpose of effecting the sale of his property, release any mortgage existing thereon.

Whether the recourse of nullity against judgment, as exercised in

MARTIN, J. delivered the opinion of the court. In this case a rule was obtained by the assignees of Wm. P. Mecker, creditors by judicial mortgage of the estate of Williamson & Patton, ordering the syndics of the creditors of that estate to shew cause why they should not rescind that mortgage, make a bill of sale of a

house, by them sold to S. Henderson, which was subject to said mortgage, and pay to Mecker's assignees the proceeds of that sale, as well as the price of some land lying in the Alabama territory, which was also sold by the said syndics. The syndics, in answer to that rule, state, that they have no power to rescind the mortgage in question; that as to the proceeds of the Alabama lands, they are restrained from paying them by a bond which they have entered into to pay only when the right of the claimants shall have been established; they further say that the judgment under which the assignees claim is null, and that it gives them no right to be paid in preference to the other creditors. The district court, considering that they had not sustained their pleas, made the rule absolute, and ordered them to pay into the hands of the assignees the sum by them claimed. From this decree the syndics have appealed.

Spain, still exists in this state?

Under a general allegation of nullity, nothing which does not appear on the record can avail.

A judicial mortgage cannot extend to lands out of the state.

A doubt was suggested whether this is a decision from which an appeal can lie, but that it has between the parties the effect of a final judgment, and bears all the marks of such except the name, is so evident, that any demonstration of this is deemed useless.

The first cause shewn by the syndics of Williamson and Patton, why they should not com-

East'n District. July, 1818.

WILLIAMSON & AL. vs. THEIR CREDITORS.

ply with the rule, is, that they have themselves no power to rescind the mortgage obtained by the assignees of Wm. Mecker, and that the mortgagees alone can exercise that right. A law enacted on the 20th of February, 1817, concerning the voluntary surrender of property, has especially provided, that for the purpose of effecting the sale of the property of the insolvent the syndics shall be authorized to release the mortgages existing on it; but the syndics of Williamson and Patton contend that this provision is not applicable to failures made anterior to that law. Whether it is or not, we think that this act did not introduce any innovation on this particular subject, and that before its enactment syndics of creditors were fully vested with the power which the present parties disclaim exercising. Before appealing to any authorities on that point, it may be premised that this results from the nature of things; as soon as a failure is declared, all the property of the debtor passes into the hands of his creditors. A general liquidation becomes necessary, for which purpose the creditors must resort to a sale of all the estate. To effect this, the creditors make choice of agents, under the name of syndics, who are vested with the necessary authority to do for all the creditors what these

would have a right to do for themselves. The sale which they make of the property to the end of paying each creditor, according to his rank and privilege, is a sale made by all. After such a sale, no individual creditor can retain a lien upon the property sold and paid for, any more than he could retain it after selling the property himself and receiving the price. The rescission of the mortgages and privileges is a necessary consequence of that sale. Nor does it appear requisite that a formal release of them should be given, because when the creditor has caused his pledge to be sold to have payment of his debt, the pledge is gone, and is re-placed by the price for which it sold. *Febrero, book 3, de juicios, ch. 2, sect. 5, n. 340*, speaking of the purchaser of property exposed at public sale, says: "he is equally free from any molestation on the part of the creditors, who were parties to the *concurso*, and at whose instance the thing was sold, although the purchase money should not be sufficient to pay their claims, because by their consent to the alienation of the property, their right on the thing was relinquished," &c. It is our opinion that, by a sale legally made at the instance of the creditors, through their syndics, all mortgages and privileges which existed in favor of those who were

East'n District. *July*, 1818.

WILLIAMSON & AL. vs. THEIR CREDITORS.

East'n District. *July*, 1818.

WILLIAMSON & AL. vs. THEIR CREDITORS.

parties to the *concurso*, become *ipso jure* extinct, and that a formal release of them is not necessary: but that when such release is required by the purchaser, the syndics are the proper persons to give it. In this case the sale of the house to S. Henderson does not appear to have been made in the manner required by law; but the mortgage creditors having, by their demand of the purchase money, assented to the alienation, and ratified the act of their agents, the respective situation of these parties is the same as if the syndics had originally observed the established rules.

But if the syndics are authorized to purge the mortgages which may exist on the property sold, in order to receive the purchase money, they say that this money ought not to be paid to the assignees of William P. Mecker in preference to the other creditors, because the judgment under which they claim is null. Under that plea, however, they do not appear to have attempted to shew any ground of nullity apparent on the face of the record; but they offered to go into evidence to prove that the judgment was null, collusive and fraudulent.

Admitting the recourse of nullity against judgments still to exist, a question which this court will be unwilling to decide, so long as

there shall be no absolute necessity to pronounce upon it. *Mecker's assignees* vs. *Williamson and Patton's syndics*, 4 *Martin*, 625.

We believe that a general allegation of nullity does not put at issue all the facts from which any of the causes of nullity can arise, but only such as may be apparent on the face of the record. The causes of nullity, as laid down by the Spanish jurists, are multifarious. Most of them are vices or defects of form, proceeding from violation of the solemnities prescribed by law in the administration of justice. Of those proceedings the only legal evidence is the record; and therefore, a general allegation of nullity may well embrace all the questions arising on the face of it, because the parties are not at liberty to seek evidence elsewhere; but when the cause, from which the nullity is expected to be shewn, depends on facts out of the record, then a special allegation of such facts is indispensible to enable the adverse party to come prepared to meet them. Nothing would be more unjust than to submit him, under a general allegation of nullity, to try any question which the complainant might think proper to start. For example, a judgment is said to be null when it has been obtained by means of forged papers, when it has been procured by bribery, or when

East'n District. *July*, 1818.

WILLIAMSON & AL. vs. THEIR CREDITORS.

parties to the *concurso*, become *ipso jure* extinct, and that a formal release of them is not necessary: but that when such release is required by the purchaser, the syndics are the proper persons to give it. In this case the sale of the house to S. Henderson does not appear to have been made in the manner required by law; but the mortgage creditors having, by their demand of the purchase money, assented to the alienation, and ratified the act of their agents, the respective situation of these parties is the same as if the syndics had originally observed the established rules.

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East'n District. *July*, 1818.

WILLIAMSON & AL. vs. THEIR CREDITORS.

the party, whose oath has been required for some discovery, has perjured himself. Can he, against whom the nullity is alledged generally, be compelled to go to trial, upon any or all of these matters? That would be contrary to all principles of law and rules of practice.

The same reasoning will apply to the testimony offered to shew that the judgment was obtained by collusion and fraud, that fact not being at issue between the parties, under the general allegations contained in the pleas of the appellants.

It is our opinion that the only error, in the decree complained of, is in that part of it which allows to Meeker's assignees the proceeds of the Alabama lands; because that property, being situated out of the territory of Orleans, as then possessed by the United States, could not be affected by the judicial mortgage under which they claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and this court, proceeding to give such a decision as they think ought to have been rendered below, do order, adjudge and decree, that the appellants do complete the sale by them made to S. Henderson

of the house mortgaged to the appellees, and pay into the hands of the appellees the purchase money of the same, when received: and it is further ordered, that the appellees do pay the costs of this appeal.

Duncan for the plaintiffs, *Livingston* for the defendants.

DREUX, EX'R. &c. vs. *DUCOURNAU*

Although the register of mortgages certifies that the land is free of mortgage, if it appear that the order of court, by which a mortgage was ordered to be cancelled, was obtained in the absence of the mortgagee, the purchaser is not compelled to pay the price.

APPEAL from the court of the parish and city of New-Orleans.

MATHEWS, J. delivered the opinion of the court. This suit is instituted to recover the balance of the price of a tract of land, sold by the plaintiff and appellant, on which a mortgage was retained for the payment of the price.

The defendant and appellee resists the claim, on the ground that a mortgage still exists on the land, against the plaintiff's testator, in favor of one Berger, from whom it was purchased.

An order of seizure having been granted by the parish court against the mortgaged premises, was stayed by an injunction, which was afterwards made perpetual, unless the plaintiff should

East'n District. *July*, 1818.

DARCY, ET'X. vs. DUCOUDRAU.

legally prove that Berger's claim, resulting from the mortgage in his favor, has been satisfied.

From this decision the plaintiff appealed.

The facts necessary to be noticed in this case are as follows: Bouthemy, the plaintiff's testator, purchased the premises from Berger, for the sum of eight thousand dollars, giving a mortgage to the seller, general on all his property, and special on the land sold. This mortgage was afterwards transferred to J. B. Labatut, to secure the payment of fourteen hundred and eight dollars and fifty cents, and afterwards to T. Durnford, to secure that of three thousand two hundred dollars, payable June 18, 1807, who, on the 13th of June, 1808, gave a final acquittance, on his part, by a notarial act. Labatut did the like. All this appears by the certificate of the register of mortgages: these acts being regularly recorded in his office. It is also shewn that Berger's mortgage was entirely cancelled and annulled, by an order of the parish court, on the 15th of May, 1817. The register further certifies, in general terms, that no mortgage now exists on said property. But, on referring to the record of the suit, in which the order for cancelling Berger's mortgage is had, was made, we find it to be a suit against Durnford, to which Berger was not a party.

The only question, arising on these facts, is whether the mortgage on the property purchased by the defendant has been legally and justly cancelled, so as to render him liable to be condemned to pay the plaintiff's claim, either in equity, or according to the terms of their contract.

The certificate of the register of mortgages, declaring, in general terms, that, according to his records, no mortgage now exists on the land against Bouthemy's estate is *primâ facie* evidence in favor of the plaintiff's right to recover his claim, on the ground of Berger's mortgage having been raised and annulled. But, this must be compared and examined with, and explained by, the other facts apparent in the case, which shew the manner of proceeding on the part of the plaintiff, in a former case, to affect the raising and cancelling of said mortgage.

It is perhaps true, that either of the assignees of the mortgage might have received the whole amount secured by it, and in that event an acquittance *in toto* would have been good against the original mortgage. The debt secured was payable by instalment, and the debtor and mortgagor thought fit to pay to the assignees of his creditor, the sums for which the transfer was made, and acquittances were given and

East'n District. *July*, 1818.

DREUX, ex'r. vs. DUCOURNAU.

received to that effect. It is our opinion that these acquittances operated an extinguishment of all the equitable right, title and interest which the assignees held under the transfer of the mortgage, and perhaps all authority to sue for or collect any balance that might remain, which is certainly the property of the original mortgagor, who may be considered as reinstated in his former right as to what remains due after an acknowledged satisfaction made to his transferees.

If this opinion be correct, the parish judge was right in considering his order of the 15th of July, 1817, as founded in error, being granted in a suit against Durnford who was no longer interested in the mortgage. For by such an order or decree, the right of Berger ought not to be affected, as he was not made a party to the action. This decree of the parish court, it is believed, being the only foundation for the certificate of the register of mortgages, by which he certifies that no mortgage now exists on the land: the force of its evidence is destroyed by the erroneous circumstances, under which the order was made, and leaves the property, for any thing that appears to the contrary, still liable to Berger's mortgage for the balance remaining due of the price, which Bouthemy

bound himself to pay for it. The defendant, having knowledge of this, could not have paid the whole amount promised by him for the plantation, with safety, unless he should be well secured against Berger's claim, and ought not, in equity, to be compelled to do it, without such a surety. But, by the stipulations of his contract, he cannot be compelled to pay, till the plaintiff produces legal evidence that the mortgage granted by his testator to Berger has been fairly cancelled and annulled, which does not appear in the case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Desbois for the plaintiff, *Workman* for the defendant.

DENYS vs. *ARMITAGE.*

A curator's surety is liable to an action, on the bond, although neither he nor his principal have been sued for a settlement.

Appeal from the court of the parish and city of New-Orleans.

Martin, J. delivered the opinion of the court. The plaintiff sues as attorney to the absent heirs of one J. Hatfield, and the defendant

East'n District. July, 1818.

DENIS vs. ARMITAGE.

is the surety of one B. Fleming, who had been appointed curator to Hatfield's estate. The object of the suit is to recover 305 dollars 12 cents, the amount of the estate of the deceased. There was judgment for the plaintiff, and the defendant appealed.

The statement of facts admits the appointment of the plaintiff, by the court of probates to institute the present suit—that the defendant and L. Shaw executed the bond in suit, as sureties of the curator—that the amount of the property inventoried is 305 dollars, 12 cents—and that the curator died without accounting.

The defendant contends the suit is prematurely brought, as there is no proof of any demand, and consequently no evidence of any *refusal* on the part of the curator or his representatives, and it is only in the case of a refusal that the act of 1809, 4 § 4 authorizes a suit like the present to be brought. The petition alledges, and the statement of facts admits the appointment of the plaintiff to bring suit. We must presume, that the necessary requisites were shewn to the court of probates before the appointment was made.

It is said the suit is to be brought to compel a settlement, and the defendant is sued to pay. The act cited speaks of compelling the party to

deliver *the amount* in his hands; and this is to be obtained by a suit on the bond.

II. It is contended, that the bond is void, being for *double* the sum which the law requires, we are of opinion that it is void *pro tanto* only.

III. The defendant alledges, that the debt due by the curator is unliquidated, and the curator was entitled to certain allowances for several expenses, &c. The rule is *de non existentibus & non apparentibus eadem est lex.* If he was entitled to any allowance, he ought to have alledged and proved his claim, and the inferior court could not allow it otherwise.

IV. The present suit is in the nature of an action of debt at common law; but it does not follow that all common law principles, relating to that kind of action, apply to a suit on a bond brought in this country.

V. It was the duty of the curator and his representative, *to account and deliver the amount in his hands.* For the performance of this duty, he gave the bond, which the defendant signed, as surety. This has not been done; and, on a breach of the condition, the surety is liable to a

East'n District. July, 1818.

DENIS vs. ARMITAGE.

suit, although neither the curator nor his surety have been sued for a settlement.

Lastly, there cannot be a question that the parish of Orleans has a court of probates, whose business is transacted as in all other parishes of the state, and the judgment was properly rendered in this case for the amount due.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

The plaintiff, *in propriâ personâ*, Harper for the defendants.

ALEXANDER vs. *JACOB & AL.*

The mortgagee cannot prevent the sale of the premises by a creditor of the mortgagor, but may insist on his being paid, out of the proceeds, in preference of the seizing creditor.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellant built a house for Henry Jacob, one of the defendants. Jacob, not being able to pay him, agreed to let him collect the rents of the house until the extinguishment of the debt. The appellant did actually obtain part of his payment in that manner; and, being about absenting himself, left the house under the care of an agent, authorized

to receive the rents. While he was absent, Prampin, a creditor of Jacob, caused the house to be seized and sold by the sheriff, and received the purchase money. The plaintiff, on his return, instituted the present suit against Jacob, and Madam Souzet and her husband, the now occupiers of the premises, praying that Jacob might be condemned to pay him the amount of his claim, and that the other parties might hear it decreed that his said claim is privileged upon the house in question. Judgment was rendered in the lower court against Jacob, but in favor of the other defendants.

The defence of the appellees rests upon several grounds; the first of which in order is, that the appellant is not entitled to have and maintain his action against them. The objection which they raise, under that part of their answer, is that, before the plaintiff could sue them, he ought to have obtained judgment against his debtor, Jacob, as required in such cases by our statute. *Civ. Code*, 460, *art.* 43. The article relied on does not seem, however, to support the defendant in that objection. It goes no further than providing that the creditor, whose pledge is in the hands of a third possessor, shall not cause it to be sold, without having previously obtained judgment against his

East'n District. *July*, 1818.

ALEXANDER vs. JACOB & AL.

principal debtor; but it does not say that the third possessor shall not be called to hear that judgment; and this mode of proceeding, being clearly more advantageous to the third possessor, to whom it gives an opportunity of debating the claim of the creditor and contradicting his evidence, we see no good reason why it should not be admitted.

But, under that part of the answer of the appellees, another objection arises, which this court must take notice of, and which goes to defeat this action. The appellees are not third possessors, who have bought from a debtor property incumbered with a mortgage or privilege. They are purchasers of property sold under execution, at the suit of a creditor of the mortgagor. The creditor, whose pledge is seized and offered for sale at the suit of another creditor, would not, if present, have a right to oppose that sale, and to preserve his pledge in kind, until he should please to have it sold himself. His right is that of being paid out of the proceeds of sale, in preference to the seizing creditor, if his claim is of a higher order or anterior date. *Curia Philipica, tercero opositor*, n. 9. As a consequence of that principle, if the privileged creditor was absent, and had no knowledge of the sale, his first recourse is

against the seizing creditor, to make him refund the proceeds, before he can molest the purchaser, and cause the property again to be seized and sold. *Febrero, de juicios*, 3, 2, *n.* 341. This is the course pointed out by justice and equity, and which this court think themselves bound to maintain.

This view of the case precludes the necessity of examining the other points at issue between the parties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Carleton for the plaintiff, *Hennen* for the defendant.

Workman, on a motion for a re-hearing. The appellees, says the court, are not third possessors who have bought from a debtor encumbered property—they are purchasers of property sold under execution at the suit of a creditor of the mortgager.

These persons appear to me to be third possessors, in the strictest sense of the law. What meaning can the expression third possessors have, if not that of possessors distinct from

East'n District. *July*, 1818.

ALEXANDER vs. JACOB & AL.

either of the two parties, debtor and creditor? In what do the purchasers from a debtor himself, differ from those who purchase at a sheriff's sale? Is not the sheriff on such occasions a mere agent or minister of the law? Is it not the debtor's right, and that right only, which he is authorized to dispose of? The plain, obvious, lexicographic import of the words third *possessor* is any lawful possessor other than the debtor or creditor in question.

The passage cited from the *Curia Philipica* does not tend to destroy or diminish my client's right. The article referred to says—"Si el *accreedor posterior executante se opone, pidiendo solo se le entreguen como tal los bienes executados per derecho de prenda de su deuda, esta oposicion no impide la execucion. Y asi sin embargo de ella, se ha de continuar, y vender los bienes, y de su valor y precio pagar al anterior, y de lo que restare, al posterior que executó.*" All this is very satisfactory. It is not pretended, that the privilege or mortgage creditor can prevent the sale by a subsequent creditor, and preserve his pledge in kind, until he should please to have it sold himself. Such sales may always take place, subject to the antecedent incumbrance; and such sales will clear off the incumbrances, provided payment be

made to the antecedent creditors. This payment, the court will perceive, is the essential and indispensible circumstance to give validity to the proceedings. The law does not say that the anterior creditor shall have a mere right to payment—a good cause of action against the subsequent creditor, who receives the proceeds of the thing sold. It says he shall be paid. His right to the proceeds is of the same kind as that which, previous to the sale, he had to the pledge itself. Now, it seems most evident, that all this doctrine contemplates the case of a sale made when the anterior creditor is present, and when the proceeds of the sale are in the hands of justice. The object of the law is to secure the right of that creditor—not to defeat it. Therefore, the doctrine cannot be applicable, when the proceeds of the sale have got into the possession of the executing creditor; otherwise the privilege would be annihilated. The privileged creditor would have lost his pledge; and, being reduced to the rank of a mere simple contract or chirographic creditor, he would be left to his remedy against the person, or the personal property, of the subsequent executing creditor. For the monies once paid into the hands of the latter, how could they be fixed—how bound by any privilege whatever? How

East'n District
July, 1818.

ALEXANDER
vs.
JACOB & AL.

could they be traced—by what sign or car-mark identified? Thus, according to the decision of the court, the rights of any privilege or mortgage creditor might be defeated, and his lien on the pledge wholly destroyed by the contrivance, even of his debtor. This debtor would only have to grant a new mortgage to some friend or accomplice, and procure this new creditor to sue for an order of seizure and sale, which not being objected to, according to the supposition of collusion between the parties, would take place in ten days; at the end of which period, the confederates might share the spoil, and leave the antecedent mortgagees to seek their remedy as they might. To such persons who might have absconded from the state, or who, if they remained in it, might entertain their creditors with a *cession de biens*, and settle all accounts according to the provisions of the act of insolvency.

If the anterior creditors were present, and in the habit of perusing the advertisements in all the daily newspapers, they might, indeed, defeat this goodly project, by interposing their claims. But who thinks, or who ever thought it necessary to be thus perpetually on the look out to preserve a privilege or a mortgage? Does not every mortgage creditor deem it sufficient

that his hypothecation is recorded, and that it is thus completely secured against the legerdemain of chicane or fraud?

If the creditor on the spot would have some chance of security, the absent creditor would have none at all.

Publish this doctrine to-morrow, and in less than a twelvemonth, I am persuaded, we shall find the rights of mortgage creditors, and the credit of the state itself, materially injured by it.

The texts, on which the commentary above mentioned of the *Curia Philipica* is founded, put the question out of all doubt. The 5th part, title 13, law the 38th declares that the right of pledge is extinguished by paying the creditor, or depositing the sum due for him, in case he refuses the payment.

All these provisions arise out of the following decision of the Roman civil law. *Quod si res sit pignorata, quæ pignori capta est, videndum est an sic distrahi possit, ut dimisso creditore, superfluum in causam judicati convertatur. Et quanquam non cogatur creditor rem, quem pignori accepit, distrahere, tamen in judicati executionem servatur, ut si emptorem invenerit res quæ capta est, qui dimisso priore creditore, superfluum solvere ei paratus, admittenda sit hujus quoque rei distractio. Nec*

East'n District. July, 1818.

ALEXANDER vs. JACOB & AL.

videtur deterior conditio creditoris fieri tunc consecutare, nec prius jus pignoris dimitti, quam si ei fuerit satisdatum. Dig. 13, 1, 8, § 5. Here it is seen that the payment of the prior creditor is the condition precedent, the *sine quâ non* of the execution. The subsequent creditor is not entitled to the proceeds of the pledge, but only to the overplus, remaining after the anterior creditor has been satisfied.

And let it be particularly remarked, if the court please, that all the authorities referred to, contemplate a pledge, not a mortgage, — *pignus*, not *hypotheca*, a thing in the actual possession of the creditor, — a thing possessed by others, in which he has only an invisible, incorporeal right. To sell this pledge without his knowledge, is impossible. And when it is sold by judicial authority, he may retain or demand the amount for which it may have been pledged to him. Very different is the situation of a mortgage or privilege. The property affected by the one or the other, may be disposed of, as in the instance now before the court, without the creditor's consent or knowledge; and the whole proceeds removed or dissipated before it could be possible for him to secure, or even to claim any part of them.

The articles of the civil code, already quoted

the trial of the cause, secure the privilege of creditor, whatever may have been the Spanish law on the subject. If there is any discrepancy between these systems of legislation, our code must of course prevail.

Lastly, the determination of the court in the case of *Sadler* vs. *Lafon*, referred to and explained at the first hearing, is in strict conformity to these laws, and was supposed to have set all these questions at rest. 4 *Martin*, 477.

The decision of the present case is believed to admit principles unknown to our ancient law, principles adverse to those of our civil code, contrary to uniform and approved practice, and dangerous to the rights of all privileged and mortgage creditors. A rehearing of the cause is therefore respectfully and earnestly requested.

No re-hearing was granted.

DAPREMONT vs. *PEYTAVIN*, *ante* 323.

After the copy of a judgment has been sent to an inferior court, to put it in execution, the parties are out of court, and the supreme court cannot amend

In this case, there was judgment for the plaintiff, in this court, last January. He was, however, decreed to pay costs, there being an allegation in the answer of the defendant, in the district court, that no amicable demand was made, and no evidence of such a demand hav-

East'n District. *July*, 1813.

D'APREMONT vs. PRUTAVIN.

ing been offered by the plaintiff; it having escaped the attention both of his counsel and this court, that the defendant had, in the petition, been required to say, on oath, whether no amicable demand had not been made, which he had neglected to do.

it, on the motion of the party injured.

Turner, for the plaintiff, now drew the attention of the court to this error, and prayed that the judgment might be amended. But THE COURT was of opinion, that this could not be done, as the defendant was out of court, nearly six months having elapsed since the rendition of the judgment: *Moreau*, the defendant's counsel, declining to consent to an amendment, as he was without authority from his client, and a copy of the judgment, with the mandate of this court, to put it into execution, having issued several months ago.

DESHON & AL. vs. *JENNINGS*, *ante* 368.

Former judgment confirmed.

Workman, for the plaintiffs, on a motion for a re-hearing. The judgment of the court, if carried into effect, will, it is apprehended, occasion great injury to the heirs and creditors of the estate, the care of which has been en-

trusted to the appellant, by his testator, Champlin. The suit instituted against Jennings, for the recovery of the property, which he took from the body of the deceased, in Attachapas, may be abated, and he, of course, be left at liberty to walk off with his plunder, wherever he pleases.

The provisions of the *Civ. Code*, 242, *art.* 103, will, we apprehend, be found incompatible with, and utterly destitute of, the very important provision of another part of the statute, *id.* 104, *art.* 232, in favor of wills made in foreign countries. The former of those articles says expressly, that no testament can have effect in the territory until it has been presented to the judge of the parish, &c. Now this presentation, in case of most wills, made in foreign countries, will be impossible, as the originals of those wills cannot be obtained. So that, unless we admit that the concluding words, *in the cases prescribed by law*, have reference to the ordering the execution, as well to the opening and proving of the will, we must conclude that foreign wills can have no validity whatever in this state. The article in question consists but of one sentence. Is it not then clear, that the restriction of the concluding words is applicable to every part and provision of the article?

East'n District. *July*, 1818.

DESHON & AL. vs. JENNINGS.

So that it should be construed as if written thus: "In the cases prescribed by law, every testament shall be presented to the judge, &c. and, after being opened and proved, the judge shall order it to be executed."

Then comes the question, what are the cases in which these formalities are prescribed by law? The answer is obvious: the cases of wills, made in the state—the only wills which can be presented, opened and proved in the manner directed. Would it not be quite unnecessary for the legislature to require proof of that, the proof of which was already made and admitted? If they had contemplated any thing of this kind, in the case of wills made in foreign countries, they would have ordained that the probate of such wills, not that the wills themselves, should be proved here.

The provisions of the 109th article would be completely effectual, if the executor were allowed to sue, on presenting to the judge only the probate of the will. If a common power of attorney be sufficient to enable one man to sue for another, where would be the danger or inconvenience of allowing an executor to bring suit, under the authority of a probate; an instrument generally executed with many forms and much solemnity. In either case, forgery would be

doubtedly be impossible; but, in that of the probate, it would be much more difficult, and liable to detection, than in the case of the power of attorney. In the one case, as well as in the other, whenever suspicious circumstances occurred, the proceedings might be suspended, until the truth could be inquired into and ascertained.

At all events, we trust that the court of probates of this parish may be authorized to appoint a temporary curator to the estate, to save it from dilapidation, until the testamentary executor can be recognized in the manner required by the judgment of the court, should their opinion remain unaltered. According to the opinion already pronounced, it would seem, that the court of probates does not possess this power, so long as there is an executor present, who is willing to act. If the executor cannot act lawfully, and if no curator or administrator can be appointed, the consequence would be, that the succession in question may be plundered with impunity.

Hennen, for the defendant. The provisions of our code are positive and too clear to be contradicted. A will must be proven before the

East'n District. *July*, 1818.

Dixon & al. vs. Jennings.

judge of the parish in which the testator died, if the will was made and he died in the state.

A curator can only be appointed by the judge of the parish in which the intestate died. Champlin having died within the parish of St. Mary, the judge of that parish alone can appoint a curator to his estate, or approve any will, which may be produced from any other state, provided it be clothed with the requisite formalities.

The only question before this court, in this appeal is, had the judge of the parish of New Orleans jurisdiction in the case? Certainly he had not, since Champlin died in another parish. All the provisions of our civil code demonstrate that, if inconveniences arise, under the acts of our legislature, it belongs not to this court to provide a remedy. Its province is only to interpret and enforce the laws. In no state of the union are wills, made abroad, proven with more facility than in this. It is only required that the will be executed according to the laws of the state in which it was made. On the proof of that, it has its full effect here.

The curator appointed in one parish can act in every other, and have an inventory of the intestate's property made wherever it is situated. So may the executor. All that the judge of

this parish could do, would be to make an inventory of Champlin's property found in it.

East'n District. July, 1818.

DESHON & AL. vs. JENNINGS.

MARTIN, J. delivered the opinion of the court. In this case a re-hearing has been granted to the appellants.

They contend, that the provision of the civil code, that "no testament or codicil can take effect in the territory, until it has been presented to the judge of the parish, in which the testator died, if he died within the territory, or in which his principal estate lies, if he died out of the territory, and the said judge shall order the execution of the said testament or codicil, after its being opened and proved in the cases prescribed by law," (*Civ. Code 242, art. 153.*) applies only to testaments and codicils made in the state.

This is said to be rendered clear from the latter words, "the said judge shall order the execution, &c. in the cases required by law." These cases are said to be those of testaments and codicils, made in this state and no other. And it is added, that when testaments or codicils are made according to the laws of, and with all the formalities required in, other states and countries, and are there proven, they do

East'n District. July, 1818.

Deshon & al. vs. Jennings.

not require to be proven here, and we are referred to the *Civil Code* 232, *art.* 109.

The distinction taken by the counsel does not appear to us within the letter nor within the spirit of the code, in which we are told that no testament or codicil can take effect in this territory until, &c. and this whether the testator died within or without it. Testaments made and proven abroad are not produced to the judge to be proven: but yet the execution of them may be ordered. This appears particularly necessary in case of foreign wills, that copies, or the originals in some cases, may be exhibited in the court of probates and there registered, in order to perpetuate in favor of persons who may pay monies to the executor, the evidence of his authority. Foreign wills, which have been proven abroad, are to be presented although they require no additional proof, any more than authentic wills made here. And this article speaks of testaments to be presented to the judge, which the law does not require to be either opened or proven, *after their being opened and proved in the cases prescribed by law.*

In the other part of the code relied on, after the provision that the formalities, required in the confection of wills in the state, are matters of rigor, and the absence of any of them avoids

the will, the legislature next proceeds "provided always that the testaments and codicils made in foreign countries, &c. shall take effect, if they be clothed with all the formalities prescribed in the place where they have been respectively made." *Civ. Code* 232, *art.* 109.

Nothing here militates against the necessity of producing such testaments to the judge, in order that, if they be clothed with such formalities, the execution of them may be ordered.

II. It is next contended that the *Civil Code* 174, *art.* 127, requires the judge of the parish or of the parishes in which the deceased had moveable or unmoveable property, debts or credits, to make inventories of the same, &c. and the counsel contends that it follows, as a necessary consequence, that a curator is to be appointed in each of these parishes. This by no means follows. The parish judge cannot act out of the limits of his parish, he cannot go into a neighboring or distant one to make an inventory. Each judge must do so in his parish *ex necessitate rei*, but these inventories must be cumulated in that parish in which the curator is appointed. He may go or send, and act by himself or attorney in every part of the state.

This curator is to be appointed by the judge

East'n District. July, 1818.

Desson & al. vs. Jennings.

of the parish in which the deceased shall have died, if he died within the territory, or, if he died abroad, by the judge in whose parish the greatest portion of his estate shall be situated. 474, *art.* 131.

The counsel further complains that our judgment does not decide whether the parish judge of New-Orleans can retain in his hands the property which he has caused to be inventoried, or appoint a provisional curator thereto, until a person shall appear properly authorized to administer the estate.—Farther, that the judgment simply affirms the judgment of the court of probates; that we do not say what is to be in operation, and we do not determine what is to become of the injunction granted below.

The appellants prayed for the absolute curatorship of the estate—it was refused them—they appealed to this court, who think the curatorship was properly denied. If there be any particular feature in the case, which requires the interference of the court of probates in any measure; this interference must be specifically prayed for, and we entertain no doubt that what ought to be, will be done. If it be not, the way to this court will remain open.

Upon the whole, it is ordered, adjudged and

decreed, that the judgment heretofore rendered in this case shall remain in full force and vigor, in the same manner as if no re-hearing had been granted.

East'n District. *July*, 1818.

Dixon & al. vs. Jennings.

*** There was not any case determined in the month of August.